No. 05-1472

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID MILLER, Superintendent, Eastern Correctional Facility,

Petitioner,

—v.—

JOSE RODRIGUEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for a writ of certiorari, the defendant advances three meritless contentions. First, defendant contends that the first of the questions presented by the State was not raised by the State in the court below, and that neither of the questions presented by the State was decided by the court below. That set of circumstances, the defendant argues, strongly militates against review by this Court. Second, the defendant contends that the resolution of this case may depend on evidence that was not before the state courts, and that the district court abused its discretion in permitting the State to supplement the record with that new evidence. Finally, the defendant contends that the Second Circuit's decision, holding that the defendant's family was improperly barred from the courtroom during the testimony of an undercover officer, was merely an unexceptional application of well-established and venerable case law that allegedly has recognized the defendant's right to have his family present during his trial. As shown below, the defendant's three contentions are incorrect, and the defendant has failed to show that either of the two questions raised by the petition is unworthy of this Court's review.

1. The petition for a writ of certiorari in this case presents two questions. Through the first question, the State asks this Court to hold that whenever, consistent with the Sixth Amendment, the general public has been excluded from the courtroom for the protection of a testifying undercover police officer, then the defendant's family

also may be excluded from the courtroom. *See* Petition ("Pet.") at 18-20. The defendant maintains, with respect to the first question, that this Court should not hear this case because the State did not argue below what it is asking this Court to hold, and because the Second Circuit did not decide the issue. *See* Brief in Opposition ("Br. Opp.") at 1-2, 4-5.

It is true that in the court below, the State did not make the argument that it is advocating before this Court. However, as explained in the petition for certiorari, prior case law in the Second Circuit precluded the State from making that argument. *See* Pet. at 20 n.2. Indeed, for the State to have argued in the Second Circuit that a defendant's right to the presence of his family at his trial is no greater than his right to the presence of the general public—and thus, to have argued that the Second Circuit should overrule a prior decision of that court (*see Vidal v. Williams*, 31 F.3d 67 [2d Cir. 1994], *cert. denied*, 513 U.S. 1102 [1995])—the State would have had to seek en banc consideration of this case. *See Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005) (a prior panel decision of the Second Circuit must be followed unless the rationale for that decision has been overruled by the Supreme Court or by the Second Circuit sitting en banc); *BankBoston, N.A. v. Sokolowski*, 205 F.3d 532, 534 (2d Cir. 2000) (same).

In any event, although this Court generally will not review an *issue* that was not raised in the lower courts, it always has allowed the parties to make new *arguments* in support of claims properly presented below. *See, e.g., Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). In this case, the defendant claimed in the court below that

the exclusion of his family from the courtroom during the undercover officer's testimony violated his right to a public trial. The State argued that when, as in this case, the defendant's relatives live within, or in close proximity to, the neighborhood to which the officer will be returning in an undercover capacity, then the closure of the courtroom to his relatives—along with the rest of the public—does not violate the Sixth Amendment. Thus, the issue of whether the exclusion of the defendant's relatives from the courtroom violated the Sixth Amendment was squarely presented below, and the State is merely making a new and broader argument in this Court in support of the State's position that the exclusion was proper.

The defendant's contention that the Second Circuit did not *decide* the first question presented by the State is incorrect. In rejecting the State's narrower claim that the defendant's relatives were properly barred from the courtroom because they lived in or near the neighborhood to which the undercover officer would be returning, the Second Circuit necessarily (albeit implicitly) rejected the State's more far-reaching claim, made here, that whenever the general public may be excluded from the courtroom for the protection of the officer, the family, too, may be excluded.

The defendant's contention that the Second Circuit did not decide the second question presented by the State (*see* Br. Opp. at 19-20) is also incorrect. Through the second question, the State asks this Court to hold that the use of a screen, which would enable spectators to remain in the courtroom but would prevent them from seeing the undercover officer as he testifies, constitutes a reasonable alternative to closure, and to hold that when the trial court devises a reasonable alternative to closure, the four-part test of *Waller v. Georgia*, 467 U.S. 39

(1984), which governs *closures* of the courtroom, does not apply.

The State made these same arguments in the court below. The Second Circuit explicitly rejected the State's argument that the *Waller* test did not apply to alternatives to closure, and hence, did not reach the question of whether the utilization of a screen constituted a reasonable alternative to closure (Appendix ["App."] at 14a-15a). 439 F.3d at 76. In holding that a record justifying the complete closure of the courtroom is a prerequisite to the consideration of alternatives to closure, the Second Circuit plainly rebuffed the argument advanced by the State and reiterated here: that a different test applies to alternatives to closure (instances in which the courtroom is not closed) than to closures. Thus, this case provides this Court with an opportunity to address that important question (in the event that the Court does not decide the case in the State's favor on the basis of the first question presented).

2. The defendant also argues that this case is inappropriate for review by this Court because, according to the defendant, resolution of the case may depend on evidence that was not before the state courts and that the district court allegedly should not have permitted the State to present for the first time in the habeas proceeding. *See* Br. Opp. at 6 n.1. However, both of the questions presented by the petition for certiorari can be answered without reference to the evidence adduced for the first time in the district court, which evidence concerned where the defendant's mother and brother had been residing at the time of the defendant's trial.

This Court may address the State's first argument, that if the general public may be barred from the courtroom, then the defendant's family may be barred as well, without reference to any evidence adduced in the district

court. If this Court were to reject that argument, but accept the State's alternative argument that the defendant's relatives may be barred at least when it is shown that they live in or near the area to which the undercover officer will be returning, then this Court—if it deemed the record made in the state court inadequate—could remand this case to the Second Circuit for it to rule on the issue that that court left unresolved: whether the district court appropriately received the new information presented by the State. *Cf. Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (remanding companion case, *Hammon v. Indiana*, to Indiana Supreme Court for determination of unresolved issue).

Likewise, without reference to the evidence adduced in the district court, this Court could resolve the methodological issue underlying the second question: whether or not full satisfaction of the four-part *Waller* test is a prerequisite to consideration of alternatives to closure. The evidence adduced in the district court is also unnecessary for the resolution of the question of whether the use of a screen is a reasonable alternative to closure. In any event, again, if the defendant's entitlement to habeas relief ultimately depended on the new evidence presented to the district court, then this Court, after announcing the applicable rules of law, could remand this case to the Second Circuit for it to rule on the question that that court left open.

Thus, the fact that the district court permitted the State to supplement the record is no impediment to this Court's consideration of this case.

3. Finally, the defendant confidently asserts that "*Waller* and *In re Oliver* [333 U.S. 257 (1948)] leave no room for doubt that the very core of the Sixth Amendment public trial right is its protection of a defendant's interest in the presence of family and friends"

(Br. Opp. at 3), and he maintains that the Second Circuit's decision, holding that the defendant's family was improperly barred from the courtroom during the testimony of the undercover officer, was merely an unexceptional application of this well-established and venerable principle. The defendant is incorrect.

First, as the Second Circuit itself has recognized, this Court's observation in *Oliver* about an accused's entitlement to the presence of friends and relatives at his trial (333 U.S. at 271-72; *see* Pet. at 17) is dictum.[1] *See Yung v. Walker*, 341 F.3d 104, 110 (2d Cir. 2003); *see also Sevencan v. Herbert*, 342 F.3d 69, 74 (2d Cir. 2003), *cert. denied*, 540 U.S. 1197 (2004). Moreover, *Oliver*—which overturned a conviction following a trial that was held in complete secrecy—did not announce any kind of a test for determining when, if ever, a courtroom may be closed to the public; the Court in *Oliver* merely held that the public trial right of the petitioner in that case had been violated by the secret trial to which he had been subjected. It was not until *Waller* that this Court provided a framework for adjudicating Sixth Amendment public trial claims (*see* 467 U.S. at 48), and this Court has never applied the *Waller* test in the context of a court's exclusion of a defendant's family from the courtroom.

The defendant's contention that, since time immemorial, the courts have recognized that an accused's right to have his family and friends attend his trial is the

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[1] Under 28 U.S.C. § 2254(d)(1), a state prisoner is not entitled to habeas relief unless the state courts' adjudication of the claim at issue was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court. "[C]learly established Federal law" is limited to this Court's holdings and does not include dicta. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000).

essence of the Sixth Amendment public trial right (*see* Br. Opp. at 11), is misleading, because the cases that appear to support that contention all predate the modern era of Sixth Amendment jurisprudence, which was inaugurated by *Waller*. Indeed, in the cases cited by the defendant (two of which also are cited in *Oliver*), the courts seem to have upheld the exclusion of the general public from the courtroom, under circumstances that almost certainly would not be permitted today, because the defendant's friends or family were not excluded.[2] But these cases simply do not address the question of whether, in a case in which the general public is *properly* excluded from the courtroom for the safety of a witness, the State must make some additional showing to justify the exclusion of the defendant's family. Moreover, *Waller* itself does not address that question.

Second, the defendant is incorrect in his claim that the Second Circuit's determination in this case involved merely a straightforward application of the *Waller* test, and, indeed, that the outcome was all but inevitable. The test announced in *Waller* is stated in sufficiently general terms that the conclusion of the Second Circuit—that the

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[2] *See People v. Hall*, 51 A.D. 57, 59, 64 N.Y.S. 433 (App. Div. 1900) (given the "filthy character" of the testimony that would be presented, it was proper, for the protection of public morals, for the court to bar everyone but designated friends of accused from courtroom); *People v. Kerrigan*, 73 Cal. 222, 14 P. 849 (1887) (defendant's use of profane language justified closure of courtroom to public, in order to preserve decorum; defendant's friends and other specified groups were exempted from closure order); *Grimmett v. State*, 22 Tex. Ct. App. 36, 2 S.W. 631 (Ct. App. 1886) (most of public excluded to relieve embarrassment of witness, but closure order exempted anyone who could have been of service to the accused); *cf. State v. Beckstead*, 96 Utah 528, 88 P.2d 461 (1939) (order excluding all spectators, which was subsequently modified to exempt relatives of the accused, denied the accused his right to a public trial, since relatives were barred during a portion of trial).

state courts had unreasonably applied *Waller* in upholding the exclusion of the defendant's mother and brother from the courtroom, *see* 28 U.S.C. § 2254(d)(1)—far from being unavoidable, is unsupportable.

Indeed, the Second Circuit's own prior decisions show that the defendant's assertion, that it is well understood that an accused has a virtually unfettered right to the attendance at trial of his relatives, is overstated. For example, in *Woods v. Kuhlmann*, 977 F.2d 74 (2d Cir. 1992), the Second Circuit upheld the exclusion of all of the defendant's relatives during the testimony of a witness, even though only one member of the family had threatened the witness. The Second Circuit accepted the supposition of the trial court, unsupported by any evidence (although supported by common sense), that if any family members remained, they might aid the threatening family member. *Id.* at 75, 77. In *Carson v. Fischer*, 421 F.3d 83 (2d Cir. 2005), the Second Circuit held that although the exclusion of the defendant's former mother-in-law (whom the Second Circuit considered to be a family member) did not comport with *Waller*, the exclusion was too "trivial" to implicate the defendant's Sixth Amendment rights, since other family members attended the trial. *Id.* at 91-94.

And in *Sevencan v. Herbert*, 316 F.3d 76 (2d Cir. 2002), the Second Circuit originally held that a state trial court's decision to exclude the defendant's family, along with the general public, from a criminal trial would not be an unreasonable application of Supreme Court precedent, so long as the trial court, prior to conducting its *Waller* analysis, was made aware that there were members of the defendant's family whom he desired to have in attendance at the trial and the court otherwise reasonably applied the general requirements of *Waller*. *Id.* at 86. That holding was deleted when the opinion was

subsequently amended (*see Sevencan v. Herbert*, 342 F.3d 69, 75 n.3 [2d Cir. 2003], *cert. denied*, 540 U.S. 1197 [2004]); but the fact that for a time the Second Circuit had a position not dissimilar to the position advanced by the State in this Court—at least with regard to the application of the deferential standard of review of 28 U.S.C. § 2254(d)(1) to the constitutionality of the closure of the courtroom to the defendant's relatives—surely demonstrates that the parameters of the right of a defendant to have his relatives attend his trial are neither obvious nor settled.

Finally, it is noteworthy that the Second Circuit itself regarded it as a "close question" whether the district court in this case had properly relied on the Second Circuit's amended decision in *Sevencan* (342 F.3d 69), which had upheld the exclusion of a family member (App. at 12a). 439 F.3d at 75. The hairsplitting distinction that the Second Circuit drew between the evidence of likelihood of encounter in *Sevencan* and this case (App. at 12a-13a), 439 F.3d at 75, further shows why the decision of the state courts in this case should have been upheld as a reasonable application of *Waller*.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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